

Local 28, Bricklayers & Allied Craftsmen (AFL-CIO) and Sal Masonry Contractors, Inc. Case 3-CB-3899

December 8, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER

On July 27, 1982, Administrative Law Judge Melvin J. Welles issued the attached Decision in this proceeding. Thereafter, Respondent and the Charging Party filed exceptions and supporting briefs, and Respondent filed an answer to the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Local 28, Bricklayers & Allied Craftsmen (AFL-

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge found that Traveling Superintendent Sinesi was a representative of the Charging Party for purposes of collective bargaining or the adjustment of grievances, within the meaning of Sec. 8(b)(1)(B) of the Act. Member Fanning agrees, but solely on the basis of the Administrative Law Judge's finding that Sinesi actually possessed and exercised the authority to adjust grievances. See Member Fanning's dissent in *Chicago Typographical Union No. 16 (Hammond Publishers, Inc.)*, 216 NLRB 903, 905 (1975). In finding the violations, Member Fanning relies on the fact that Sinesi was not shown to have performed any "rank-and-file" work. See his concurring opinion in *Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO (The Washington Post Company)*, 242 NLRB 1079, 1084 (1979).

² Respondent excepts to the language of the Administrative Law Judge's recommended Order, contending that it does not require Respondent to cease and desist from the specific actions which the Administrative Law Judge found had violated the Act. We shall modify the recommended Order to conform it more closely to the violations found. We further note that the Administrative Law Judge's recommended Order requires Respondent to cease and desist from restraining or coercing "any other employer," as well as the Charging Party. In our view, nothing in the record before us warrants such a broad order. We shall modify the recommended Order accordingly.

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CIO), Syracuse, New York, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraphs 1(a) and (b):

"(a) Preferring charges against, fining, or otherwise disciplining Matthew Sinesi, or any other supervisor of Sal Masonry Contractors, Inc., for performing supervisory duties or, at most, minimal rank-and-file work behind the Union's picket line.

"(b) In any like or related manner restraining or coercing Sal Masonry Contractors, Inc., in the selection of its representatives for the purposes of collective bargaining or the adjustment grievances."

2. Substitute the following for paragraph 2(a):

"(a) Rescind and expunge all records of the charges, trial, or fine levied against Matthew Sinesi for performing supervisory duties or, at most, minimal rank-and-file work behind the Union's picket line."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO MEMBERS

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT charge, fine, or otherwise discipline Matthew Sinesi, or any other supervisor of Sal Masonry Contractors, Inc., for performing supervisory duties or, at most, minimal rank-and-file work behind our picket line.

WE WILL NOT in any like or related manner restrain or coerce Sal Masonry Contractors, Inc., in its selection of representatives for the purpose of collective bargaining or the adjustment of grievances.

WE WILL rescind and repay the fine levied against Matthew Sinesi, with interest, and expunge all records from our files of the charges, fine, or trial against him.

LOCAL 28, BRICKLAYERS & ALLIED
CRAFTSMEN (AFL-CIO)

DECISION

STATEMENT OF THE CASE

MELVIN J. WELLES, Administrative Law Judge: This case was heard in Syracuse, New York, on March 12, 1982, pursuant to a charge filed on August 17, 1981, and a complaint issued on September 25, 1981, alleging that Respondent Union violated Section 8(b)(1)(B) of the National Labor Relations Act, as amended, herein called the Act.

Upon the entire record,¹ including my observation of the witnesses, and after due consideration of the briefs filed by the General Counsel, Respondent, and the Charging Party,² I make the following:

I. THE BUSINESS OF THE EMPLOYER AND THE LABOR ORGANIZATION INVOLVED

Sal Masonry Contractors, Inc., the Charging Party, herein called the Company, is a New York corporation, with its principal office in Syracuse, New York. It is engaged in masonry contracting at various jobsites in the State of New York. During the past year, it received goods and materials from points outside the State of New York valued in excess of \$50,000. I find that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Respondent admits that it is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. The Issues

The complaint alleges that Respondent Union violated Section 8(b)(1)(B) of the Act by fining union member Matthew Sinesi for working behind the Union's picket line. Respondent's principal defense is that Sinesi allegedly performed a substantial amount of rank-and-file work behind the picket line. Respondent also argues that, even if Sinesi were a supervisor within the meaning of Section 2(11) of the Act (not conceding that he was), firing him could not have adversely affected his performance of his obligations as a representative of the Employer "for the purposes of collective bargaining or the adjustment of grievances," because he had no such responsibilities. Finally, Respondent claims that the case should be dismissed because Sinesi "was being utilized as a behind-the-scenes informant in the subject labor dispute, pretending to be a rank-and-file member while in reality doing the employer's bidding as a conduit for information in an attempt to undermine the Union's position with its members."

B. The Facts

On July 15, 1981, during the course of an economic strike by Respondent Union against employer members of the Building Trades Association of Central New

York, of which the Company was a member, the Union began picketing at a project in Jamesville, New York, where the Company was the masonry contractor. At that time, Matthew Sinesi, "traveling superintendent" for the Company, crossed the picket line five or six times, starting on July 15. On July 24, 1981, the Union charged Sinesi with violating the Union's constitution and rules of order by working during the strike. On August 7, Sinesi was found guilty of the charged violation, and fined \$1,250 (\$250 for each day he worked). Sinesi paid the fine, and then appealed the Local's decision to the International. Although the International reversed the decision, Respondent has not returned the money to Sinesi.

Sinesi, who has been a union member for 41 years, has been employed by the Company for 23 years, the last three as "traveling superintendent."³

Sinesi testified that his duties as traveling superintendent involved, first, picking up blueprints and charts to get "a general idea" of the job, when a new contract was given to the Company. He then checked specifications to see if any special material was needed, got "samples," and took them to the architect. Sinesi would then mark any changes on the blueprint, find out when the job was ready to go, and "set it up." The latter included ordering materials and equipment that were needed, and determining what foreman to use on the job. Sinesi traveled around, covering all the Company's jobs. He supervised "all of them." He has authority to hire and fire employees, including the foremen. He has hired both rank-and-file bricklayers and foremen, but has not had occasion to fire any foremen, only bricklayers. He also testified that he "handled grievances on our jobs." He referred specifically to a "grievance" involving bricklayer Mike Frenza, for whom he interceded when the immediate foreman on the job wanted Frenza fired, because "I felt that our foreman did not follow protocol." Sinesi also testified to having served as a go-between between Frenza and the Union during the strike.⁴

Vice President Fresina confirmed Sinesi's testimony as to his duties in all essential respects. He said that Sinesi is his "direct link to the field work, so that anything that involves the actual construction of the job would run through him." When the Company gets a job, Fresina goes over the general scope of the project with Sinesi. They discuss foremen and manpower needs, and what materials are needed and where to buy them. Sinesi then sets up the job, getting all necessary equipment and a foreman to run the project, with whom he discusses how many men are needed. Sinesi makes sure that changes directed by the architect during the course of a job are done, and at times goes to the architect, the general con-

¹ The record includes a stipulation of facts respecting the Company's operations submitted after the hearing closed.

² I grant Respondent's motion to strike the portion of the Charging Party's brief referring to the decision of the International union on the appeal by Sinesi of his fine.

³ Sinesi and Company Vice President Salvatore Fresina both testified that Sinesi was a "traveling superintendent" at all pertinent times. Respondent introduced earnings records for 1979 through 1981. The 1979 record shows Sinesi as a "mason" during the first 6 months and a "superintendent" the last 6 months. The 1980 record shows him as Syracuse mason superintendent (Syr mas. supt.) for the first half year, and "superintendent" the second half, and the 1981 record as "superintendent" for the full year. As Sinesi's duties and authority, not his titles, are controlling, this seeming discrepancy is of no significance.

⁴ I agree with Respondent that this participation of Sinesi as a "go-between" in no way rose to the level of making him a representative of the Company for collective-bargaining purposes.

tractor, or the inspector of the job to straighten out possible discrepancies. He is also authorized by Fresina to handle grievances arising on the job, to "solve whatever problem there is" with the men on the job. All instructions to Sinesi are verbal; there are no written directions to Sinesi to handle grievances, hire or fire, or the like.

Respondent adduced evidence (the Company's "employee earnings records") that showed that Sinesi was paid the foreman's rate required by the collective-bargaining agreement during 1979 through 1981. Fresina testified, however, that Sinesi was not paid in the same manner as other personnel, who received pay only for hours worked, but was paid on a 40-hour-a-week, 52-week-a-year basis except for "personal time off." Respondent claims that Fresina's testimony in this latter respect is erroneous, pointing to the fact that, in certain weeks early in 1981, Sinesi's hours are listed as less than 40 (32 the week of January 6, and 24 and 16, respectively, the weeks of February 17 and 24) with no notation made of "personal time off," although a subsequent entry, for the week of June 2, indicates "Matt took time off personal." My examination of all the Company's records in evidence, including its reports to the pension fund, corroborates, rather than detracts from, Fresina's testimony in this respect. Thus, it is clear over the past 3 years that Sinesi was receiving the maximum number of hours per week in weeks when no other employees, or almost no other, was. I infer also that the week of June 2 does not stand alone, but that Sinesi clearly started his personal time off that week, as he has no hours listed for the following 6 weeks. The same inference can be drawn for the 24- and 16-hour weeks of February 24 and March 3—that Sinesi took a full week off, starting after 3 days of the first week and going through 2 days of the second. The only unexplained week with less than 40 hours, the week of January 6, which lists 32 hours, is more the exception that proves the rule than anything else.

During the strike, according to Sinesi, he would "just go in and confer with my foreman." He did not lay any brick, did not use any tools, and did not assist other bricklayers. He also did not train bricklayers or operate a truck or any other equipment. Outside of conferring with the foreman, Robert Bracci, Sinesi walked "back and forth to the trailer, calling the office, calling other job sites."

Foreman Bracci testified that when he first started the job (on July 15, after the strike had begun), Sinesi "would bring me addendums and changes in the blueprints; show me certain walls that he wanted laid out, and just going over the job, in general. Ordering materials." Sinesi did not, according to Bracci, lay out the job himself, work with any bricklayers, or train any bricklayers. Bracci testified that it is the "normal function" of foremen on the job to read the "addendums," which represent changes from the original layout. He went on to say that Sinesi "was showing them to me, because I had just gotten on the job, and I wasn't familiar with them." But it is the job of the traveling superintendent, Bracci testified, to "read the changes, to take them from the office, and deliver them to the job, which he does on every job."

Robert Brown, who was one of the bricklayers on the job during the strike, testified as a witness for Respondent. He stated that Sinesi "probably went over the plans with the foreman." He also testified that "Bobby [Bracci] asked Matty [Sinesi] certain questions pertaining to the lay-out, and things like that, that Matty would answer . . ." He went on to say that "it was a very poor set of plans, really. But, anyway, there was a problem as to the layout of this particular wall. I know we, Bobby and I, were looking at the plans, and then Matty came and Bobby went over them with Matty. That's about it." Brown also testified that "in my dealings with Sal Masonry on every job I have ever been on, Matty—even if there was a foreman on the job, or I was working by myself, Matty would be the man, or if Matty wasn't the man, Mike Fresina would come. But, Matty would be the man seeing what I was supposed to do, and have the things I had to have." In response to the question, "Did You observe him [Sinesi] doing anything that you would say would not normally be done by foremen under the contract?" Brown said, "No, I suppose not."

Union Business Agent Joseph Cosco testified that he was at the Jamesville jobsite on July 15, the first day of picketing by the Union. He observed Sinesi "hustling back and forth from the trailer on the job site. There were piles of blocks there, and we saw at least two bricklayers. They were in conference . . . Matty, and the other two bricklayers." Cosco also testified that the things he observed Sinesi doing "were these things that would be done by a foreman under your contract." Cosco continued to observe at the jobsite during the next few days, all day on Thursday, July 16, and Friday, July 17, and parts of each day during the following week. Sinesi was apparently not at the jobsite on Monday and Tuesday of the second week. Cosco testified that in the first 3 days of the picketing, Sinesi was "doing work like the work . . . described." He stated that his observations were from a point about 200 yards away from the activities he described as having seen. During the latter part of the strike (Thursday and Friday of the second week of picketing), Sinesi, according to Cosco, was "down by the trailer more than anything. A lot of times, he was just standing there. Sometimes he was by the side of the road, talking with members; not the pickets, but other members that were there observing the picketing."

Discussion and Conclusions

Issues

1. Whether Matthew Sinesi is a supervisor within the meaning of Section 2(11) of the Act.
2. Whether an internal union fine levied against Sinesi is in violation of Section 8(b)(1)(B) of the Act.

The Board has consistently held that a union violates Section 8(b)(1)(B) of the Act⁵ when it fines a supervisor-

⁵ Sec. 8(b)(1)(B) makes it an unfair labor practice for a labor organization to restrain or coerce "an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances."

member for working behind his union's picket line, unless the work performed by him is more than merely minimally rank-and-file work.⁶ Thus, the only two questions to be resolved in this case are whether Sinesi was, at appropriate times, a supervisor, and whether he was performing nonsupervisory work of a more than minimal nature behind the Union's picket line.

Respondent argues, as noted above, that the General Counsel has not shown that Sinesi "has any collective bargaining responsibilities for the employer." As I read Board law, there is no such burden upon the General Counsel. As the Board stated in *Columbia Typographical Union No. 101, International Typographical Union of North America, AFL-CIO (The Washington Post Company)*, 242 NLRB 1079, 1080 (1979), "union discipline of a supervisor-member performing only his regular supervisory functions could reasonably be foreseen to affect adversely the performance of that supervisor's grievance as adjustment duties." The Board added that, "In these situations, to determine whether Section 8(b)(1)(B) has been violated, the only relevant inquiry is what did the supervisor-member do during the employer-union dispute." See also *American Broadcasting Co. v. Writers Guild of America*, 437 U.S. 411 (1978).

Respondent also argues that the purposes of the Act would not be effectuated by finding a violation because "Sinesi was being utilized as a behind-the-scenes informant in the subject labor dispute, pretending to be a rank-and-file member while in reality doing the employer's bidding as a conduit for information in an attempt to undermine the Union's position with its members." This "fraudulent and deceitful concealment" asserts Respondent, requires that the complaint be dismissed on equitable grounds. Nothing in the record supports this contention factually. Although the General Counsel's efforts to show that Sinesi was a "collective bargaining representative" for the Company did not so demonstrate (a flaw not, as I have indicated, at all fatal to the General Counsel's 8(b)(1)(B) allegation), I discern no "pretense," or "fraudulent and deceitful concealment" in the actions described. Indeed, in the construction industry, it is not at all unusual for even high-ranking management officials to continue to remain dues-paying members of the appropriate union.

The record amply supports the complaint's allegation that Sinesi was a supervisor at all material times. Thus, the uncontradicted testimony shows that he had the authority to hire and fire employees, and that he has exercised such authority. He also has the authority to resolve employee grievances on the job. Although there seems to have been very few, if any, instances of Sinesi exercising this latter authority, its existence alone suffices as an indicia of supervisory status. He is for the most part the

Company's only representative on the various projects that he covers as "superintendent." It is up to him, when a new job begins, to set up the job, after consulting with Fresina about manpower needs, materials, and foremen for the job. He is also responsible for ensuring that changes during the course of the job be made, as directed by the architect, and to straighten out possible discrepancies. Although there is no written document or instruction to Sinesi concerning his authority and duties, this in no way detracts from their existence. The fact that Sinesi's "hourly pay" is the same as that in the contract between the Union and the contractors for "foremen" also falls far short of overcoming the affirmative and uncontradicted evidence concerning his duties and authority.

As noted above, the "hourly pay" in Sinesi's case is a "rate," for he is not paid on the basis of total hours worked on the job. Although being paid the same as nonsupervisors can be a factor in assessing a person's supervisory status, the method of pay alone removes that factor from consideration here. In any event, even considering Sinesi as being paid the same as "foremen" would not suffice to overcome the convincing evidence of his supervisory status. I find, accordingly, that Sinesi was at all material times a supervisor within the meaning of Section 2(11) of the Act.

The second major prong of Respondent's defense is that it could lawfully fine Sinesi for performing rank-and-file work behind the picket line. Respondent states in its brief that the "record is unclear as to what supervisory work was or is performed by Sinesi; conversely, it is clear that Sinesi performed a substantial amount of rank and file work during the picketing at Jamesville." To the extent that Respondent's argument is based on the testimony of Union Business Agent Cosco, it has no validity at all. Thus Cosco, from a point 200 yards away, observed Sinesi and Foreman Bracci "in conference there, with their backs toward us, or around the side. They definitely were in conference, going through the plans, talking, walked around the site conferring, pointing out something with a ruler, coming back. I mean, on the first day of the job, and especially something as complicated and sophisticated as that job was, there was a lot of measuring the conference and going back and forth. Eventually, they started laying block. Until 2:00, there wasn't many laid. The next day, we got back, there was a little more. There was the same type of activity there, three or four men now, very busy over the plans, taking a walk, coming back, more laborers wheeling wheelbarrows of mortar over to a site. Somebody would go there and start building a corner, or a lead." Sinesi does not deny "conferring with Bracci." Both he and Bracci testified that this occurred.

It is scarcely indicative of rank-and-file work that the superintendent on a job confers with the foreman about the work going on, or to be done. Assuming that "layout" work was, by custom, performed by foremen,⁷

⁶ See, e.g., *Chicago Typographical Union No. 16*, 216 NLRB 903, 904-905 (1975). Cf. *United Brotherhood of Carpenters & Joiners of America, Local Union No. 14 (Max M. Kaplan Properties)*, 217 NLRB 202 (1975), where the Board dismissed 8(b)(1)(B) allegations because the supervisor-member spent "at least 50 percent of his working time during the relevant period performing bargaining unit work." The Board stated in this case that the supervisor member "was an employer representative within the intent of Section 8(b)(1)(B) notwithstanding the fact that the record failed to establish that [he] was actually vested with authority to act for his employer in collective bargaining or the adjustment of grievances."

⁷ Although there is testimony that layout work was performed by foremen "under the union contract," I see nothing in the contract itself to that effect.

is not to say that in the circumstances of this case, Sinesi's conferences with Bracci were an intrusion by him into work reserved for members of the bargaining unit. A foreman is himself in a sort of in-between status on this kind of construction work. For example, the contract precludes the foreman on a job from using "tools of the trade" on any job with 10 or more bricklayers working. The true "rank and file" work is thus cleaning and laying of brick. I would doubt, in this posture, that Sinesi could be lawfully fined even had he alone performed layout work during the strike. The fact remains, however, that he did not. The minimal assistance given by Sinesi to Bracci in this respect, as to work which itself is not clearly "rank and file" work, hardly serves to justify a fine under the Board cases already cited.

For all these reasons, I find that Respondent Union violated Section 8(b)(1)(B) by fining Sinesi in connection with his working during the strike.

CONCLUSION OF LAW

By charging and fining Sal Masonry Supervisor Matthew Sinesi for working behind its picket line, Respondent Local 18 engaged in an unfair labor practice affecting commerce within the meaning of Section 8(b)(1)(B) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I shall recommend that it cease and desist therefrom and take certain action which will effectuate the policies of the Act.

Upon the foregoing findings and conclusions, and upon the entire record in the case, I recommend, pursuant to Section 10(c) of the Act, issuance of the following recommended:

ORDER⁸

The Respondent, Local 28, Bricklayers & Allied Craftsmen (AFL-CIO) Syracuse, New York, its officers, agents, and representatives, shall:

⁸ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in

1. Cease and desist from:

(a) Preferring charges against, fining, or otherwise disciplining Matthew Sinesi, or any other supervisory employee of Sal Masonry Contractors, Inc., for having crossed or worked behind the Union's picket line.

(b) In any like or related manner restraining or coercing Sal Masonry or any other employer in the selection of its representatives for the purposes of collective bargaining or adjusting grievances.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Rescind and expunge all records of the charges, trial, or fine levied against Matthew Sinesi for crossing or working behind the Union's picket line.

(b) Repay the fine levied against Matthew Sinesi, with interest computed in the manner provided in *Florida Steel Corporation*, 231 NLRB 651 (1977).⁹

(c) Post in conspicuous places at offices and meeting halls, and other places where notices to members are customarily posted, copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, on forms provided by the Regional Director for Region 3, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for a period of 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director for Region 3, in writing, 20 days from the date of this Decision, what steps Respondent has taken to comply herewith.

Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

⁹ See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

¹⁰ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."